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UNITED STATES PATENT AND TRADEMARK OFFICE
 U.S. PATENT & TRADEMARK OFFICE
 BEFORE THE COMMISSIONER OF PATENTS AND TRADEMARKS

In re)	Decision on Petition
)	under 37 CFR § 10.2(c)
_____)	

(petitioner) requests review under 37 CFR § 10.2(c) of a decision of the Director of Enrollment and Discipline, entered March 6, 1992, refusing to give petitioner a passing grade on the afternoon section of the examination for registration held on August 21, 1991.

BACKGROUND

The Director's decision was on a request, under 37 CFR § 10.7(c), for regrade of Part I, Option A of the afternoon section. Petitioner scored 64 points on the afternoon section.

The decision on request for regrade added two points, thus giving petitioner a score of 66.

Petitioner's ground for challenging the Director's decision is that five points, rather than ten points, should have been deducted for petitioner's failure to include a certificate of mailing in her answer to Part I, Option A. Petitioner thus requests that five more points be added to her score, which would give her a passing grade of 71. A minimum of four more points, however, would be sufficient to give petitioner a passing grade of 70 (out of 100).

FACTUAL REVIEW

Part I, worth 52 points, was drawn to drafting a response to an Office action. Part I presented three options -- A, B

or C. Petitioner chose Option A. Part I, Option A presents the following relevant facts:

You (i.e., the applicant for registration) are a registered practitioner. Today, on August 21, 1991, Cool Dude consults you, and asks you to represent him in prosecuting a patent application he had prepared and filed in the PTO. On March 21, 1991, an examiner mailed a first Office action to Dude rejecting claims in Dude's application, setting a three month shortened statutory period for response. Dude provides you with a copy of the application he filed and the first Office action. You agree to represent Dude.

Dude instructs you to prepare and file a response to the Office action. Dude gives you a check to cover your legal fees and for a two month extension of time. Your firm is located in Denver, Colorado. You do not have a local representative in Washington, DC and you do not have access to a FAX machine.

Petitioner drafted a response to the Office action containing both an amendment and request for a two month extension of time in the same document. Petitioner did not include a certificate of mailing pursuant to 37 CFR § 1.8. The grader deducted 10 points from petitioner's grade for failure to include a certificate of mailing.

DECISION

I find no error in the deduction of ten points for petitioner's failure to include a certificate of mailing in her answer to Part I, Option A.


Petitioner relies on the model answer as justification for raising her grade five points. The model answer presented the amendment and the request for a two month extension of time in separate documents. Each document contained a certificate of mailing. Petitioner assumes that each of the certificates of mailing in the model answer was worth five points. Since petitioner's answer presented the amendment and request for extension of time in one document, only one certificate of mailing was necessary. Thus, argues petitioner, only five points should have been deducted, not ten.

Petitioner's argument incorrectly assumes that each of the two certificates of mailing presented in the model answer is worth five points. Rather, ten points were uniformly deducted for failure to provide any certificate of mailing, regardless of whether the amendment and request for extension of time were presented in the same document or separate documents.

Deducting only five points from petitioner's grade for failure to include any certificate of mailing would unjustifiably reward petitioner with five extra points simply because she presented the amendment and request for extension of time in one document instead of in the equally valid alternative of separate documents.

CONCLUSION

No points have been added to petitioner's regraded score of 66. Since petitioner has not achieved a passing grade, the Director's decision of March 6, 1992 is affirmed. Therefore, this petition is denied.


EDWARD R. KAZENSKE
Director of Interdisciplinary
Programs

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE COMMISSIONER OF PATENTS AND TRADEMARKS

In re) Decision on Request
) for Review
)

This is a decision on a paper filed May 8, 1992, styled "Request for Review of Final Decision on Regrade of PTO Examination Pursuant to 37 CFR § 10.2(c)" (hereinafter "request for review"), by

BACKGROUND

took the examination for registration held on August 21, 1991 and failed to attain a passing grade of 70 on the afternoon section.

On February 3, 1992, [redacted] filed a request for regrade of the afternoon section under 37 CFR § 10.7(c), styled "Petition For Regrading Of Examination Under 37 CFR § 10.7(c)."

On March 6, 1992, the Director of Enrollment and Discipline (Director) entered a decision on request for regrade. That decision added two points to _____ score, raising it to 66, which was still insufficient to pass the afternoon section.

On March 11, 1992, PTO received from [redacted] a paper addressed to the Commissioner of Patents and Trademarks and styled "Petition For Review Of Director's Final Decision." The first sentence of the paper reads as follows:

Pursuant to 37 CFR 10.2(c), I request that you review the Director's Final Decision of March 6, 1992

concerning my Petition for Regrading of the Afternoon Section of the Examination held on August 21, 1991.

The following sentence, inter alia, appears under "Statements Of Facts" at page 1 of the paper:

One major point in my Petition for Regrading was not addressed by the Director. This point appears in my original Petition for Regrading in the paragraph labeled Further Consideration which appears on page 5 of the Petition. It is this point that I request you review.

The paper does not request review of any other points addressed or not addressed by the Director, nor does it request further review by the Director.

In a decision on petition under 37 CFR § 10.2(c), entered April 9, 1992, the Director's decision of March 6, 1992 was affirmed and therefore, the petition was denied. It is noted that the decision was decided by the Director of Interdisciplinary Programs, the authorized representative of the Commissioner for deciding petitions under 37 CFR § 10.2(c). The Director of Interdisciplinary Programs is not to be confused with the Director of Enrollment and Discipline.

The request for review contains, at page 1, a "Chronology Of Events." The Chronology characterizes:

the Director's decision of March 6, 1992 as a "partial decision";

"Petition For Review Of Director's Final Decision" as a petition "to obtain remainder of decision";

the decision of April 9, 1992 on petition under 37 CFR § 10.2(c) as a "remainder of decision (Final Decision)";

and

the request for review as a petition to review the "Director's Final Decision."

The remainder of the request for review consists of argument on why [redacted] should have been awarded sufficient points to give her a passing grade on the afternoon section.

DECISION

Chronology Of Events in her request for review does not accurately characterize the prosecution history in PTO following her failure to pass the afternoon section of the August 21, 1991 examination for registration.

The Director's decision of March 6, 1992 was not a "partial" decision. Nor does the record support a finding that

considered it as such. In response to the Director's decision, [redacted] filed a paper styled "Petition For Review Of Director's Final Decision" (emphasis added) and specifically requested review "[p]ursuant to 37 CFR 10.2(c)" of "[o]ne major point" not addressed by the Director. In no way is

characterization of that paper -- a "[p]etition to obtain remainder of decision", i.e., a petition to the Director to decide a major point not addressed by him in the March 6, 1992 decision -- accurate.

The paper, Petition For Review Of Director's Final Decision, was quite properly construed (1) as acquiescence in the Director's findings which were not raised in the paper, and (2) as a petition under 37 CFR § 10.2(c) on the "[o]ne major

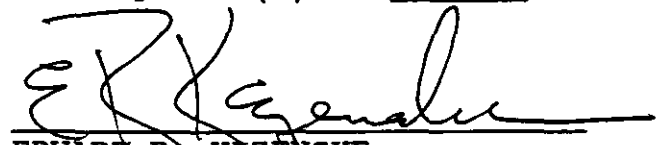
point" discussed therein. The decision on petition under 37 CFR § 10.2(c), entered April 9, 1992, addressed that "one major point" only. If intended by her Petition For Review Of Director's Final Decision that, instead of review under 37 CFR § 10.2(c), the Director decide the "one major point" which she claimed he did not address in the decision on request for regrade, she should have made that intention explicit.

has already received review pursuant to 37 CFR § 10.2(c) in the decision entered April 9, 1992, as explicitly requested in Petition For Review Of Director's Final Decision. Neither § 10.2(c), nor any other section in 37 CFR, provides for further administrative review of a decision under § 10.2(c). Nevertheless, the request for review, to the extent it is directed to the decision entered April 9, 1992, will be considered as a request for reconsideration of that decision.

The decision entered April 9, 1992 has been reconsidered. No reason is seen, however, to make any changes therein.

CONCLUSION

Request For Review of Final Decision on Regrade of PTO Examination Pursuant to 37 CFR § 10.2(c) is denied.


EDWARD R. KAZENSKÉ
Director of Interdisciplinary
Programs

AUG 10 1992

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE COMMISSIONER OF PATENTS AND TRADEMARKS

In re) Decision on Request
) for Reconsideration
)

This is a decision on a paper filed July 22, 1992, styled "Request for Reconsideration of Decision on Request for Review" (hereinafter "request for reconsideration"), by

BACKGROUND

took the examination for registration held on August 21, 1991 and failed to attain a passing grade of 70 on the afternoon section.

On February 3, 1992, _____ filed a request for regrade of the afternoon section under 37 CFR § 10.7(c), styled "Petition For Regrading Of Examination Under 37 CFR § 10.7(c)" (hereinafter "request for regrade").

On March 6, 1992, the Director of Enrollment and Discipline (Director) entered a decision on request for regrade (hereinafter "decision on regrade"). That decision added two points to [redacted] score, raising it to 66, which was still insufficient to pass the afternoon section.

On March 11, 1992, PTO received from a paper addressed to the Commissioner of Patents and Trademarks and styled "Petition For Review Of Director's Final Decision" (hereinafter "petition for review"). The first sentence of the petition for review reads as follows:

Pursuant to 37 CFR 10.2(c), I request that you review the Director's Final Decision of March 6, 1992 concerning my Petition for Regrading of the Afternoon Section of the Examination held on August 21, 1991.

The following sentence, inter alia, appears under "Statements Of Facts" at page 1 of the petition for review:

One major point in my Petition for Regrading was not addressed by the Director. This point appears in my original Petition for Regrading in the paragraph labeled Further Consideration which appears on page 5 of the Petition. It is this point that I request you review.

The petition for review does not request review of any other points addressed or not addressed by the Director, nor does it request further review by the Director.

In a decision on petition under 37 CFR § 10.2(c), entered April 9, 1992 (hereinafter "Commissioner's § 10.2(c) decision"), the decision on regrade was affirmed and therefore, the petition was denied. It is noted that the decision was decided by the Director of Interdisciplinary Programs, the authorized representative of the Commissioner for deciding petitions under 37 CFR § 10.2(c). The Director of Interdisciplinary Programs (hereinafter "Commissioner") is not to be confused with the Director of Enrollment and Discipline.

On May 8, 1992, Layman filed a paper styled "Request for Review of Final Decision on Regrade of PTO Examination Pursuant to 37 CFR § 10.2(c)" (hereinafter "request for review"). The request for review contains, at page 1, a "Chronology Of Events." The Chronology characterizes:

the decision on regrade as a "partial decision";

the petition for review as a petition "to obtain remainder of decision";

the Commissioner's § 10.2(c) decision as a "remainder of decision (Final Decision)"; and

the request for review as a petition to review the "Director's Final Decision", i.e., the Commissioner's § 10.2(c) decision.

The remainder of the request for review consists of argument on why should have been awarded sufficient points to give her a passing grade on the afternoon section.

In a decision entered June 26, 1992, the Commissioner denied the request for review (hereinafter "decision on request for review"). The Commissioner found that Chronology Of Events does not accurately characterize the prosecution history in PTO following her failure to pass the afternoon section of the August 21, 1991 examination. The Commissioner found that the decision on regrade was not a "partial" decision nor does the record support a finding that considered it as such. The record shows that in response to that decision,

 filed a paper, i.e., the petition for review, addressed to the Commissioner petitioning for review under 37 CFR § 10.2(c) of "[o]ne major point" not addressed by the Director's "Final" decision, i.e., the decision on regrade. The Commissioner found that the petition for review was quite properly construed (1) as acquiescence in the Director's findings which were not raised in the petition for review, and

(2) as a petition under 37 CFR § 10.2(c) on the "[o]ne major point" discussed therein; the petition for review was decided on that basis. The Commissioner found that if [redacted] intended by the petition for review that instead of review under 37 CFR § 10.2(c), the Director decide the "one major point" which she claimed he did not address in the decision on regrade, she should have made that intention explicit. The Commissioner found that [redacted] has already received review pursuant to 37 CFR § 10.2(c) in the Commissioner's § 10.2(c) decision, as explicitly requested in the petition for review, and that neither § 10.2(c), nor any other section in 37 CFR, provides for further administrative review of a decision under § 10.2(c). Nevertheless, the Commissioner considered the request for review, to the extent it is directed to the Commissioner's § 10.2(c) decision, as a request for reconsideration of that decision. The Commissioner reconsidered that decision, saw no reasons to make any changes therein, and denied the request for review.

In the request for reconsideration, [redacted] asserts that (1) the finding by the Commissioner that the decision on regrade was not a "partial" decision is erroneous, (2) the petition for review was only a request for the remainder of a decision on her request for regrade and should not be considered acquiescence in the Director's findings not raised in the petition for review, and (3) the decision on request for review was based on erroneous "contentions" that the decision

on regrade was "not partial" and that she acquiesced to the Director's findings.

As to point (1), [redacted] argues that she did not consider the decision on regrade complete because it did not address a major point raised in the request for regrade. Since, as she claims, she could not find in the CFR a procedure for appealing an incomplete response or guidelines as to whom to direct an appeal to, she filed an appeal under 37 CFR § 10.2(c) directed to the Commissioner because that is what the decision on regrade said to do, and she labeled the decision on regrade "final" even though she did not consider it to be. [redacted] contends that because the decision on regrade was incomplete, it is not final regardless of PTO's intent.

As to point (2), [redacted] argues that her "quick action" in filing the petition for review the day after she received the decision on regrade is "indicative" that the petition for review was meant only as a request for the remainder of the Director's decision and not an acquiescence to the Director's findings in the decision on regrade. She argues that she did not acquiesce to the Director's findings but wanted a complete response from the Director to her request for regrade before seeking "reconsideration" [presumably [redacted] means review under § 10.2(c).]

As to point (3), [redacted] argues that the decision on regrade was not final until April 9, 1992, when the Commissioner's § 10.2(c) decision on the "missing part" of the

decision on regrade was mailed.

requests that the decision on request for review be withdrawn and the arguments presented in her request for review be considered, in effect, as a petition under 37 CFR § 10.2(c).

DECISION

In spite of arguments in the request for reconsideration that she believed the decision on regrade was incomplete and that she did not acquiesce in the Director's findings therein which were not raised in the petition for review, she left no ambiguity in the relief she was seeking in the petition for review. The matter within the "four corners" of the petition for review quite plainly evinces intent to petition the Commissioner under 37 CFR § 10.2(c) from the final decision of the Director on the "[o]ne major point" discussed in the petition for review, coupled with Layman's acquiescence in the Director's findings not raised in the petition for review.

so-called "quick action" in filing the petition for review one day after receipt of the decision on regrade does not require a different conclusion. Such action is also consistent with a desire to hasten review by the Commissioner under § 10.2(c) on a point which she apparently felt confident of winning and thereby ultimately hasten the receipt of a passing grade.

claim, that she labelled and addressed the petition for review the way she did because the decision on

regrade, in effect, directed her to and because the CFR provided no guidance for appealing an incomplete response, hardly seems credible. could have easily made an inquiry of the Director or the Commissioner in an attempt to ascertain the proper procedure if, indeed, she believed at the time that the decision on regrade was incomplete. Failing that, any prudent person would have at least indicated in the petition for review the relief requested, even if the petition were labelled incorrectly or addressed to the wrong official.

could have asked the Commissioner to remand to the Director for a decision on the one major point she alleged the Director did not address. Instead, she asked the Commissioner to review that point in the first instance. He did so, in the Commissioner's § 10.2(c) decision. cannot be heard to complain that the Commissioner should not have done what she asked him to do.

The request for reconsideration is denied.

ADDITIONAL VIEWS

While it would be appropriate to end this decision with the previous sentence, the following additional views are offered in the interest of terminating what is becoming an endless stream of submissions by followed by PTO decisions.

I.

major premise in the request for reconsideration is that the decision on regrade is incomplete. It is not clear

that that premise is correct.

It is true that the decision on regrade did not explicitly discuss the matter raised in the request for regrade under "Further Consideration." That matter concerned the number of points deducted for failure to include a certificate of mailing. But the decision on regrade did state that the "[t]he grader properly deducted ten (10) points for not providing a certificate of mailing." Simply because the decision on regrade did not explicitly discuss the matter raised under "Further Consideration" does not mean the Director did not consider it. It is certainly arguable that the Director's consideration of the points raised under "Further Consideration" was subsumed in the above-quoted finding.

II.

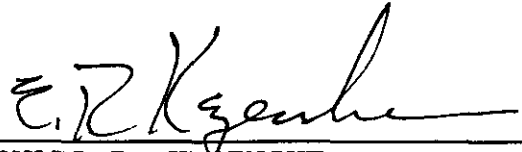
While would have the Commissioner review under § 10.2(c) the points made in the request for review as to why she should have been given a passing grade on the afternoon section of the examination, these points include some that could have, but were not, made before the Director in the request for regrade. Even if had otherwise properly petitioned the Commissioner under § 10.2(c), it would have been improper to raise those points with the Commissioner in the first instance. Thus, point that a single mistake was penalized twice would have been, and is, improper since this point could have been, but was not, raised in the request for regrade.

The remaining points in the request for review concern use of a Jepson format and her lack of a certificate of mailing. While those points were raised in the request for regrade, attempts to bolster her argument on those points by relying on a new point. The new point is that the instructions in the August 21, 1991 examination which impact on the Jepson format and certificate of mailing points contained ambiguities which were removed in the subsequent April 1992 examination. seems to imply, if not state, that differences between the two examinations reflect a belief by PTO that there were, in fact, such ambiguities.

The Director's findings concerning use of a Jepson format and her lack of a certificate of mailing have been reviewed in light of her arguments in the request for review. These findings are well-taken and require no further explication. The implication that PTO agrees that the instructions impacting on the Jepson format and certificate of mailing issues are ambiguous is rejected, nor is it found that these instructions are ambiguous.

CONCLUSION

Request for Reconsideration of Decision on
Request for Review is denied. No further review or
reconsideration of any matter emanating from grade on
the afternoon section of the August 21, 1991 examination will
be undertaken by PTO.

A handwritten signature in cursive script, appearing to read "E. R. Kazenske", written over a horizontal line.

EDWARD R. KAZENSKE
Director of Interdisciplinary
Programs